UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GREIF PACKAGING, LLC

and **Case 09-CA-060244**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED, INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

Erik P. Brinker, Esq.,
for the General Counsel.
Andrew C. Smith, Esq.,
for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. I heard this case on June 15, 2016, in Cincinnati, Ohio. After the parties rested, I heard oral argument on June 23, 2016, and issued a bench decision on June 27, 2016, pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In the complaint, the General Counsel alleged that Greif Packaging, LLC (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by suspending Richard McWilliams on December 7, 2011, and subsequently discharging Mr. McWilliams in December on about December 10, 2011.

For the reasons stated by me on the record, I found that the General Counsel did not establish, by a preponderance of the evidence, that Respondent violated Section 8(a)(3) and (1) of the Act as alleged. Therefore, I ordered that the complaint be dismissed.

In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

[1] The bench decision appears in uncorrected form at pp. 210 through 237 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as "Appendix A" to this certification.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the evidence that Respondent suspended and discharged employee Richard McWilliams in violation of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 8, 2016

Melissa M. Olivero
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX A

JUDGE OLIVERO: Good afternoon, everyone. We are here, telephonically, today for the issuance of my bench decision in the matter of Greif Packaging LLC, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Case 09-CA-060244. Present by telephone are Mr. Brinker for the General Counsel and Mr. Smith for Respondent. On Thursday, June 23, I entertained oral arguments telephonically and today, after considering the testimony, evidence, and the oral arguments presented in the case, I am prepared to render a decision. This decision is rendered pursuant to Sections 102.35(a)(10) and 102.45 of the Board's Rules and Regulations.

The charge in this case was filed on June 10, 2011, by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (which I will refer to as the Union). The charge was initially deferred to the parties' grievance arbitration procedure by the then-acting Regional Director of Region 9 on July 13, 2011. The deferral letter is in the record as Respondent's Exhibit 3. The complaint was issued on April 16, 2016 against Respondent, Greif Packaging LLC, which I may refer to as Greif or the Company during this decision. The complaint alleges at paragraph 5(a) that on or about December 7, 2011, Respondent suspended its employee, Richard McWilliams, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (which I will refer to as the Act). The complaint further alleges at paragraph 5(b) that Respondent discharged Mr. McWilliams, in violation of Section 8(a)(3) and (1) of the Act. Respondent timely filed its answer to the Complaint, denying the allegation, and raising numerous affirmative defenses. Among its affirmative defenses, Respondent asserts that it had a legitimate, non-discriminatory reason for discharging Mr. McWilliams and that the charge was not timely filed. Respondent has also raised laches as an affirmative defense. The case was tried before me in Cincinnati, Ohio, on June 15, 2016. After carefully considering all of the testimony and evidence offered at the trial, as well as the arguments of the General Counsel and Respondent, I make the following findings of fact:

Respondent admits, and I find, that it is a limited liability company engaged in the production of industrial packaging at its facility in Florence, Kentucky, where it annually sells and ships goods valued in excess of $50,000 directly to points outside of the Commonwealth of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

At the time of the events at issue, Pete Loebs was Respondent's plant manager and was the highest ranking management official at the Florence facility. At this same time, Mike Yearout was a maintenance supervisor and reported to Loebs. Chris Simpson was a second shift supervisor. Respondent admits, and I find that Loebs, Yearout, and Simpson have been at all material times supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. None of these individuals is currently employed by Respondent.

In 2010, Respondent's human resources were serviced by Respondent's regional human resources manager for the Midwest at the time, Christine Trocellier. Ms. Trocellier worked

remotely from her office in Alsip, Illinois, but sometimes visited the Florence facility. In 2010, Cathy Baker was Respondent's human resources coordinator for the Florence facility.

The alleged discriminatee, Richard McWilliams, was employed at the Florence facility from June 1999 until December 2010, when he was discharged for what Respondent claims was misconduct or violations of its work rules. The Florence facility made 55 gallon steel drums and Mr. McWilliams worked as a truck loader and running the main assembly press.

Mr. McWilliams was a member of United Steel Workers Local 805. He served as a shop steward for about 6 years and also served as the local union president for about 2 years. As a steward, Mr. McWilliams processed grievances, which he testified brought him into contact with management officials daily. He testified that these interactions sometimes became heated. However, Mr. McWilliams did not provide any specific testimony about any such interactions.

The events giving rise to this case took place in December 2010, almost 6 years before the hearing. Mr. McWilliams testified that on December 7 he clocked in for his 9 a.m. shift at 9 a.m. When he arrived at his work station, Mr. McWilliams noticed Yearout gesturing for him to come over and talk.

Yearout told Mr. McWilliams that he was 4 minutes late. Mr. McWilliams responded that he was only one minute late. Mr. McWilliams then returned to his work station. After a time, Mr. McWilliams found himself with nothing to do. Mr. McWilliams' leadman came over and told him to find something to do. Mr. McWilliams testified that he began to put ring ties together.

A few minutes later, McWilliams testified, Yearout came to his work station and told him to "stop dicking around." Mr. McWilliams later testified that Yearout added he [referring to the leadman] "told you to sweep." Mr. McWilliams testified that he did not remember that. Yearout also said find something to do, so Mr. McWilliams grabbed a broom and began sweeping.

Mr. McWilliams' testimony is contradicted by the statement of his leadman contained in Respondent's Exhibit 5. According to the leadman, he told Mr. McWilliams to sweep and Mr. McWilliams did not. The leadman's statement further indicates that Mr. McWilliams refused other directions to sweep that day and was instead seen sitting in his chair with his hands behind his head. Furthermore, Mr. McWilliams indicated that he did not need to follow the leadman's instructions because he was the union president.

Later that day, Mr. McWilliams was called to Yearout's office. When he arrived, Union Shop Steward Dave Reynolds, Yearout, and Simpson were present. Yearout had 2 disciplinary actions to present to Mr. McWilliams. First, Yearout presented a verbal warning for reporting late to his work station. Second, Yearout presented a written warning for not following his leadman's direction. These disciplinary forms are contained in the record at General Counsel's Exhibit 3. Mr. McWilliams refused to sign the forms.

Mr. McWilliams testified that he did not agree with the discipline. He said that he told Yearout, "I don't agree with that and it [is] not accurate." Mr. McWilliams testified that he told Yearout that if there was a new rule, Yearout needed to discuss it with the Union. Yearout told Mr. McWilliams to take it up with Plant Manager Loebs. According to Mr. McWilliams' rather

confusing testimony, he was upset because Respondent allegedly changed the application of its rules regarding timeliness.

After being advised of his discipline, Mr. McWilliams left Yearout's office to discuss the matter with his steward. Mr. McWilliams told Reynolds that he believed that the discipline was unfair. He told the steward that the company could not keep making up rules as they go. He also told the steward that he needed papers to file a grievance.

After about 20 minutes, Mr. McWilliams decided to return to Yearout's office. He found the door to the office open and that Simpson was still there. Mr. McWilliams entered the office and asked Yearout if he was going to be out on the shop floor tomorrow to find out if anybody else was late and write them up. Mr. McWilliams asked Yearout if he was singling him out. Yearout responded by saying "don't come into my office telling me what to do." Mr. McWilliams testified that he was 8 inches from Yearout's desk at the time of this exchange and that he raised his voice. However, a report signed by Yearout and Simpson indicates that Mr. McWilliams was leaning over Yearout's desk, pointing his finger and yelling. Mr. McWilliams was unable to explain the difference between raising his voice and yelling, despite being asked to do so. Yearout then told Mr. McWilliams to leave the office.

Mr. McWilliams turned around and started to leave the office. As he was leaving he said, "This is fucking bullshit." Yearout gestured for Mr. McWilliams to return to the office. Yearout then told McWilliams that he was suspended and asked Simpson to escort him out of the plant. The written report of the incident indicates that Mr. McWilliams left the office yelling and using profanity and saying, "I hate this fucking place."

As he was leaving the plant, Mr. McWilliams stuck his head in the break room and yelled at another employee allegedly to tell him about the change in rule application. This testimony was contradicted by a statement of the employee sitting in the break room contained in Respondent's Exhibit 6. In his statement, the employee said that Mr. McWilliams came into the break room and screamed, "How many people came back from break late?" to which the employee replied "3." Mr. McWilliams then screamed, "No, it was 4." The employee further noted that Mr. McWilliams continued to yell as he walked out the door.

After leaving the plant, Mr. McWilliams spoke to his steward, Dave Reynolds. He again asked for a grievance form and said he would turn it in. Mr. McWilliams did complete and sign a grievance report on December 8, 2010, 1 day before Respondent issued a letter terminating his employment.

Respondent conducted an investigation of Mr. McWilliams' infractions on December 8, 2010, as demonstrated by the supervisors' statement at GC Exhibit 5, the employee's statement at Respondent's Exhibit 6, and the leadman's statement at Respondent's Exhibit 5.

On December 9, Respondent's representatives Yearout, Loebs, and Baker, met with Mr. McWilliams' union representative, Dave Reynolds, to discuss McWilliams' grievance. During the meeting, Reynolds stated that Mr. McWilliams had called him and said he had screwed up. Mr. McWilliams also allegedly said some things that were not true. According to Reynolds, Mr. McWilliams said he wants his job back and doesn't want to be picked on. Reynolds further

states that he heard Mr. McWilliams tell Yearout that, "this is fucking bullshit." During the meeting Yearout continued to maintain that Mr. McWilliams leaned over his desk and he took it as a threat.

During the meeting, Loebs mentioned that Mr. McWilliams had said he did not need to do his job because he was union president (a statement echoed in the statement of the leadman at Respondent's Exhibit 5).

A couple of days later, Mr. McWilliams allegedly called Yearout to apologize in an attempt to save his job. He told Yearout that he was sorry if he came across bad. Yearout responded that the apology was accepted. Mr. McWilliams did not ask about the status of his job or the length of the suspension. I do not credit Mr. McWilliams' testimony regarding this conversation. It defies logic that Mr. McWilliams would have called Yearout and not asked about the length of his suspension or whether he was being terminated. Furthermore, I did not find Mr. McWilliams to be a credible witness for reasons stated elsewhere in this decision.

Later, McWilliams testified that he called Cathy Baker in Respondent's human resources department. She asked if he had received a letter from FedEx. He said no and Ms. Baker said she would send another. Mr. McWilliams testified that Cathy would not tell him what was in the letter and would not comment on the status of his employment with Respondent. Mr. McWilliams' testimony on this point was rather confusing. Furthermore, it again defies logic that Mr. McWilliams would not have asked about the status of his employment.

Mr. McWilliams later received a letter via regular mail advising him that he was terminated. This letter is contained in the record as GC Exhibits 4 and 6, and is dated June 9, 2010. According to the attached FedEx slip in GC Exhibit 6, the letter was not sent until December 13, 2010, thus making the charge, at least as it relates to Mr. McWilliams' discharge, timely.

The termination letter indicates that Mr. McWilliams was suspended because of his conduct when he received the disciplinary actions for reporting late to his workstation and insubordination in refusing to perform duties as assigned. The letter further indicates that Mr. McWilliams' demeanor, inappropriate language, threatening statements, and behavior fall short of Respondent's standards of conduct. The letter concludes that based upon Respondent's investigation, it had decided to terminate him immediately.

Mr. McWilliams completed a grievance regarding his discipline and suspension, a copy of which is in the record as Respondent's Exhibit 1. I note that this grievance does not mention Mr. McWilliams' termination. Mr. McWilliams disagreed with the discipline received because, he claimed, he arrived at his workstation 1 minute late (instead of 4) and because he was treated unfairly by his supervisor. The grievance does not claim that Mr. McWilliams' suspension was a result of any union or other protected concerted activity. Instead, the grievance claims that Mr. McWilliams has been discriminated against since he returned from sick leave. Mr. McWilliams indicated that he felt singled out and that he was being watched since returning from his leave. In addition, Mr. McWilliams admits that he was upset during the meeting at which he was suspended and that he stated, "This is fucking bullshit."

The parties' grievance arbitration procedure is set forth in their collective bargaining agreement, which is in evidence as General Counsel's Exhibit 2, at articles 22 and 23. Arbitration is the final step of the grievance procedure. Recourse to arbitration is available only to the Union and not individual employees. The arbitration procedure requires the moving party to write to the Federal Mediation and Conciliation Service for a list of available arbitrators. Respondent completed the form as requested by the Union and forwarded it to FMCS, as shown in Respondent's Exhibit 7. The Union did not proceed to arbitration of Mr. McWilliams' grievance.

Mr. McWilliams acknowledged receiving a copy of Respondent's employee handbook both through his testimony and in a signed document in the record as Respondent's Exhibit 2. The collective-bargaining agreement is silent as to employee behavior and conduct, insubordination, tardiness, or discipline. However, Respondent's employee handbook, contained in the record as General Counsel's Exhibit 8, contains a list of what are deemed serious offenses at pages 9 and 10. Among the serious offenses are: insubordination in refusing to carry out the instructions of a supervisor and/or acts of disrespect toward a supervisor; using profane, abusive, offensive or harassing language; threatening, intimidating, or physical or verbal assault toward another person on company property. Any or all of these actions may result in termination without prior warning or progressive discipline.

Respondent's employee handbook also contains a section dealing with workplace threats and violence at page 11. In this section, Respondent states that it has no tolerance toward threatening and violent behavior in the workplace. The term threat includes both verbal and nonverbal conduct. Threats and acts of violence are grounds for discipline, including termination of employment.

Respondent's employee handbook also contains a section on attendance and punctuality at page 20. In this section, the handbook indicates that employees are expected to be at their work stations and ready to work when the work period begins.

These are the facts as I have found them. Now I shall turn to the discussion and analysis portion of this decision. Some of my credibility resolutions have been made as part of the findings of fact herein, however, I have been presented with two versions of certain events which cannot be reconciled. Therefore, I feel the need to address the credibility of the witnesses further.

Generally, I did not find Mr. McWilliams' testimony credible. He frequently testified using generalities and he hesitated by using the phrase "you know." He also frequently ended his responses by stating, "whatever." Much of his testimony was given in response to leading questions by Counsel for the General Counsel. He tended to answer questions before the questioner was finished. In addition, he frequently stated that he did not remember specifics about key events by stating, "It was 6 years ago." He sparred with Respondent's counsel on cross-examination. In addition, I cite the following examples in support of my decision not to credit Mr. McWilliams.

Mr. McWilliams gave confusing testimony. When asked by the General Counsel what Respondent's rule was regarding timeliness, he replied that would come and go—they would use

it one month and not use it again. When asked to clarify, he only stated that you (meaning employees) need to be back maybe 1 minute before the start of your shift. Then he said a couple minutes. Later he testified it was 5 minutes. He was never able to fully elucidate what Respondent's rule was regarding timeliness, which is why I credited Respondent's employee handbook over Mr. McWilliams' testimony. I would further note that Mr. McWilliams was not able to give specific examples of how the rule was unfairly applied. No evidence was presented at trial of other employees being written up for this same infraction or of grievances filed because of unfair application of Respondent's rules.

Mr. McWilliams also changed his testimony during the course of the hearing. For example, in testifying about when he arrived at work and clocked in on December 7, he initially testified that he arrived at 8:50 for his 9:00 shift and clocked in at 9:00. Then he said he did not remember the exact time. Then he backtracked and said that the clock said it was 9:00.

Mr. McWilliams added to his testimony as the trial progressed. He added additional testimony about what was said at the meeting at which he was terminated on cross-examination. For example, Mr. McWilliams did not mention that Mr. Yearout said he would call Mr. McWilliams after he was suspended on direct examination, but added this statement on cross-examination. Furthermore, Mr. McWilliams added testimony that he asked Yearout why he was suspended on cross-examination.

The General Counsel frequently tried to rehabilitate Mr. McWilliams' testimony, such as by refreshing his recollection using his affidavit. However, these efforts only accentuated the lack of detail in Mr. McWilliams' unaided testimony.

Mr. McWilliams has also been convicted of a crime of dishonesty. Mr. McWilliams admitted on cross examination that he spent 38 days in jail as a result of stealing property. Although his criminal case was reduced from a felony to a misdemeanor, theft is still a crime of dishonesty and I may consider it in assessing Mr. McWilliams' credibility under Rule 609 of the Federal Rules of Evidence. I consider this conviction as confirming my determination that Mr. McWilliams' testimony was not credible. However, I would have discredited his testimony based solely on the previously mentioned factors. Prior to the revelation of Mr. McWilliams' theft conviction, I had determined to discredit his testimony for the previously stated reasons. He was an incredible witness, and his testimony was not sure or convincing enough to be worthy of belief. I did not rely on any of his testimony in my findings unless it was corroborated by a more reliable witness or piece of evidence, was inherently plausible, or it was an admission against his own interest.

I found the testimony of Ms. Trocellier mostly credible. Her demeanor on the witness stand was steady and sure. She did not waver under cross-examination. In addition, the General Counsel did not attempt to impeach her testimony. Therefore, I have credited Ms. Trocellier's testimony over that of Mr. McWilliams.

However, I have not relied upon Ms. Trocellier's testimony regarding a voicemail message allegedly left by Mr. McWilliams for Yearout. I note that this voicemail message is not referenced anywhere in Mr. McWilliams' termination paperwork or Respondent's position statements to the Board.

It is well-settled Board law that it is inappropriate, and in fact error, to draw an adverse inference from an employer's failure to call a former supervisor or manager as a witness, since in such circumstances, it may not be reasonably assumed that the witness would be favorably disposed toward the employer. *Reno Hilton Resorts*, 326 NLRB 1421, 1421 fn. 1 (1998) (judge erred in drawing adverse inference from failure of Employer to call former officials involved in decision to subcontract.); *Irwin Industries*, 325 NLRB 796, 811 fn. 12 (1998) (no adverse inference from failure to call former supervisors). Thus, I draw no adverse interest against Respondent for not calling Yearout, Loebs, or Simpson as witnesses.

First, I shall address Respondent's defense that the complaint is time-barred under Section 10(b) of the Act. Section 10(b) reads in pertinent part: "Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ." 29 U.S.C. § 160(b). Pursuant to Section 10(b), a violation of the Act cannot be found, "which is inescapably grounded in events predating the limitations period." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 422 (1960). The evidence at trial established that the charge was filed on June 10, 2011. The evidence further established that Mr. McWilliams was suspended on December 7, 2010. In *Redd-I, Inc*., 290 NLRB 1115 (1988), the Board held that, "If a charge was filed and served within six months after the violations alleged in the complaint, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (1) they are closely related to the violations named in the charge, and (2) occurred within six months before the filing of the charge." The charge itself does not reference Mr. McWilliams' suspension at all. Moreover, the charge was not filed until more than 6 months after Mr. McWilliams' suspension. Thus, I find that the allegation in paragraph 5(a) of the complaint concerning Mr. McWilliams' suspension is time-barred under Section 10(b) of the Act.

However, I find that the allegation related to Mr. McWilliams' discharge is not time-barred under the Act. Respondent prepared a letter to Mr. McWilliams dated December 9, 2010, advising him that his employment had been terminated. This letter indicates that it was sent via FedEx. The FedEx airbill produced by Respondent in response to the General Counsel's subpoena indicates that the letter was not sent until December 13, 2010. Thus, based on this piece of objective evidence, I find that Mr. McWilliams was not notified of his termination until at least December 13, 2010. As the evidence establishes that Mr. McWilliams was not notified of his termination until after December 13, 2010, I find that the complaint allegation related to his termination was not time-barred under Section 10(b) of the Act.

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries the initial burden of persuading by a preponderance of the evidence that an employee's protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. The adverse employment action alleged by the General Counsel in this instance was the discharge of Mr. McWilliams.

Under *Wright Line*, the elements required for the General Counsel to meet his initial burden are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Relco Locomotives*, 358 NLRB 229, 229 (2012), enfd. 734 F.3d 764 (8th Cir. 2013) (observing that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employee all support inferences of animus and discriminatory motivation").

If the General Counsel meets that burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line*, 251 NLRB at 1089; *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

The General Counsel has established union activity on the part of McWilliams only inasmuch as he was the Union's president at the time of his suspension and discharge. It seems obvious that Respondent would have had knowledge of Mr. McWilliams' status as Union president, so I find that Respondent had knowledge of Mr. McWilliams' union activity.

The only mention of Mr. McWilliams' status as union president during the events at issue came from Mr. McWilliams himself. When Mr. McWilliams was told by his leadman to sweep, Mr. McWilliams told the leadman, "He did not have to do what I say because he is the Union Pr[esident]." This statement is corroborated in that it was mentioned in the meeting between Dave Reynolds and Respondent's representatives regarding Mr. McWilliams' grievance. However, this statement reveals only that Mr. McWilliams may have mentioned his status as union president in an effort to avoid working. Mr. McWilliams specifically denied making any such statement on cross-examination. If I were to discount the written statements contained in the record, I would be left with no mention being made of Mr. McWilliams' status as union president.

I do not find that Mr. McWilliams' protestations over his discipline amounted to protected concerted activity. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The Board has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc*., 247 NLRB 612 (1980). An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp*., 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d 996 (1st Cir. 1988). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen & Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984); *National Specialties Installations*, 344 NLRB 191, 196 (2005).

The Board has held that whether an employee's activity is concerted depends on the manner in which the employee's actions may be linked to those of her coworkers. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). The Supreme Court has observed that "[t]here is no indication that Congress intended to limit [Section 7] protection[s] to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems*, 465 U.S. 824, 835 (1984). Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 4. Employees act in a concerted fashion for a variety of reasons, some altruistic and some selfish. Id. citing *Circle K Corp*., 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993).

Activity by a single individual for that person's own personal benefit is not construed as concerted activity. *NLRB v. Adams Delivery Service*, 623 F.2d 96 (9th Cir. 1980) (individual griping about his overtime pay was not concerted activity). See also, *Tampa Tribune*, 346 NLRB 369, 371-372 (2006) (employee who raised a personal gripe complaint about favoritism was speaking only for himself and there was no evidence that his coworkers even shared his belief that favoritism existed so no protected concerted activity.)

Mr. McWilliams raised only his own allegedly disparate treatment to Yearout. He did not mention other employees. Because I have not credited the testimony of Mr. McWilliams, I have not found that he mentioned that if there was a new rule, Yearout needed to discuss it with the Union. Although I did find that Mr. McWilliams entered the office and asked Yearout if he was going to be out on the shop floor tomorrow to find out if anybody else was late and write them up, as it is corroborated by his grievance form, I do not find that this statement amounts to protected concerted activity by Mr. McWilliams. Mr. McWilliams' griping to his supervisor was purely personal in nature and not concerted activity undertaken for mutual aid or protection. McWilliams was complaining about his own discipline and not Respondent's treatment of other employees. In addition, there is no evidence that other employees shared Mr. McWilliams' concerns about Respondent's alleged discriminatory actions toward him. Furthermore, the charge itself in this case indicates that Mr. McWilliams's termination was due to his union activities being local union president.

I find the *Interboro* doctrine, cited by the General Counsel in his closing argument, inapplicable here. In *NLRB v. City Disposal Systems Inc*., 465 U.S. 822 (1984), the Supreme Court gave its approval to the Board's *Interboro* doctrine, which, in general terms, states that an employee has the right under Section 7 of the Act to assert rights conferred on him and his fellow employees through a collective-bargaining agreement. However, the collective-bargaining agreement in this case is silent regarding tardiness or insubordination or threats or even progressive discipline. There is no evidence in the record that the employee handbook, which does contain provisions regarding the aforementioned subjects, was collectively bargained. As such, Mr. McWilliams was not raising any concern conferred to him or other employees through a collective-bargaining agreement.

Most importantly, however, the General Counsel has set forth no evidence regarding antiunion animus on the part of Respondent. The record is devoid of contemporaneous statements by Respondent regarding Mr. McWilliams' status as union president or other protected, concerted activity, except the statement in the meeting with Dave Reynolds by Loebs

that being union president did not mean that Mr. McWilliams did not have to do his job. This does not show animus toward Mr. McWilliams' union activity, it shows a lack of tolerance for Mr. McWilliams' insubordination. Simply put, I cannot find any evidence that Respondent bore animus toward Mr. McWilliams for any union or other protected, concerted activity.

Furthermore, the General Counsel did not produce evidence that Respondent tolerated behavior such as threats or insubordination from other employees. The record further establishes that Respondent investigated the events giving rise to Mr. McWilliams' discharge. There is no evidence of suspicious timing, departures from past practices, or disparate treatment. Thus, I find no reason to infer that Respondent's reason for discharging Mr. McWilliams was discriminatory.

During the hearing, the General Counsel intimated that Respondent's position statements, in the record as General Counsel's Exhibits 9 and 10, demonstrate that Respondent has engaged in shifting defenses. But, having examined Respondent's defenses for consistency and reason, it must still be remembered that it is the General Counsel who bears the burden of proof. Therefore, I must ultimately examine the General Counsel's case in chief and my examination shows the General Counsel's case to be doomed by the inability of his only witnesses to testify credibly.

Accordingly, I find that the General Counsel has not met his burden of establishing that Mr. McWilliams' union activity was a motivating factor in his discharge.

However, even if the General Counsel had met his burden of proving that Mr. McWilliams' discharge was motivated by his union or other protected, concerted activity, I find that Respondent had legitimate reasons for discharging him. Mr. McWilliams' purported union activity coincided with his insubordination and verbal assault on a supervisor, both serious violations of Respondent's policies. Respondent's employee handbook states that these violations of its rules may result in immediate discharge. Thus, I would find that it was these violations on Mr. McWilliams' part which led to his termination, not any unproven union or protected concerted activity.

It is well settled that the Board does not substitute its own judgment for the employer's as to what discipline would be appropriate. *George Mee Memorial Hospital*, 348 NLRB 327, 322 (2006); *Fresno Bee*, 337 NLRB 1161, 1162, 1181 (2002). Mr. McWilliams acknowledged signing for a copy of Respondent's employee handbook, which includes a list of serious violations for which an employee may be terminated. It is not appropriate for me to use my subjective judgment to second guess Respondent's disciplinary decision and interpretation of its rules. See *Consolidated Biscuit Co*., 346 NLRB 1175, 1180 (2006).

I also find the *Atlantic Steel* doctrine inapposite to this case. Counsel for the General Counsel argues that Mr. McWilliams' statements during and after his meeting with Yearout on December 10, 2010, were within the parameters of *Atlantic Steel*, 245 NLRB 814 (1979). However, *Atlantic Steel* only applies when an outburst, or other strong language, occurs in the midst of the employee's protected concerted activities. *Plaza Auto Center, Inc*., 355 NLRB 493, 494 (2010), I have found that there was no protected, concerted activity engaged in at the December 7, 2010 meeting. The discussion was only about Mr. McWilliams' work deficiencies,

not the conditions of employment of all the employees. Instead, the evidence establishes that it was Mr. McWilliams' outburst at this meeting, coupled with his insubordination and tardiness, which resulted in his discharge. I therefore recommend that this allegation be dismissed.

In summary, I do not find that the General Counsel has established, by a preponderance of the credible evidence, that Respondent suspended and later discharged Mr. McWilliams as alleged in paragraph 5 of the complaint. As such, I do not reach Respondent's affirmative defenses. Therefore, I make the following conclusions of law:

1. Respondent, Greif Packaging LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization under Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the evidence that Respondent suspended and discharged employee Richard McWilliams in violation of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended order:

The complaint is dismissed in its entirety.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. When the certification is served upon the parties, the time period for filing exceptions will begin to run. I direct your attention to the Board's Rules and Regulations regarding the time period for filing exceptions. I want to thank counsel for the General Counsel and counsel for Respondent for your professionalism and competence in presenting this case. With that, the trial is now closed and we are off the record.